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Obergefell v. Hodges: Same-Sex Marriage Legalized

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Summary

On June 26, 2015, the Supreme Court issued its decision in *Obergefell v. Hodges* requiring states to issue marriage licenses to same-sex couples and to recognize same-sex marriages that were legally formed in other states. In doing so, the Court resolved a circuit split regarding the constitutionality of state same-sex marriage bans and legalized same-sex marriage throughout the country. The Court's decision relied on the Fourteenth Amendment's equal protection and due process guarantees.

Under the Fourteenth Amendment's Equal Protection Clause, state action that classifies groups of individuals may be subject to heightened levels of judicial scrutiny, depending on the type of classification involved or whether the classification interferes with a fundamental right. Additionally, under the Fourteenth Amendment's substantive due process guarantees, state action that infringes upon a fundamental right—such as the right to marry—is subject to a high level of judicial scrutiny.

In striking down state same-sex marriage bans as unconstitutional in *Obergefell*, the Court rested its decision upon the fundamental right to marry. The Court acknowledged that its precedents have described the fundamental right to marry in terms of opposite-sex relationships. Even so, the Court determined that the reasons why the right to marry is considered fundamental apply equally to same-sex marriages. The Court thus held that the fundamental right to marry extends to same-sex couples, and that state same-sex marriage bans unconstitutionally interfere with this right.

Though the Supreme Court's decision in *Obergefell* resolved the question of whether or not state same-sex marriage bans are unconstitutional, it raised a number of other questions. These include questions regarding, among other things, *Obergefell*'s broader impact on the rights of gay individuals; the proper level of judicial scrutiny applicable to classifications based on sexual orientation; what the decision might mean for laws prohibiting plural marriages; the Court's approach to recognizing fundamental rights moving forward; and the proper level of judicial scrutiny applicable to governmental action interfering with fundamental rights. This report explores these questions.

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On June 26, 2015, the Supreme Court issued its decision in *Obergefell v. Hodges* legalizing same-sex marriage throughout the country by requiring states to issue marriage licenses to same-sex couples and to recognize same-sex marriages that were legally formed in other states. In doing so, the Court resolved a circuit split[1] regarding the constitutionality of state same-sex marriage bans.

This report provides background on, and analysis of, significant legal issues raised by the Supreme Court's decision in *Obergefell*. It first offers background on the constitutional principles on which the Court relied in *Obergefell* to invalidate state same-sex marriage bans as unconstitutional. Then, it walks through the Court's opinion and rationale. Finally, it discusses potential implications of the Court's decision.

General Constitutional Principles

Equal Protection

Under the Fourteenth Amendment's Equal Protection Clause, "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws."[2] Though there is no parallel constitutional provision expressly prohibiting the federal government from denying equal protection of the law, the Supreme Court has held that equal protection principles similarly apply to the federal government.[3] Under the Constitution's equal protection guarantees, when courts review governmental action that distinguishes between classes of people, they apply different levels of scrutiny depending on the classification involved. The more suspect the government's classification, or the more likely that the government's classification was motivated by discrimination, the higher the level of scrutiny that courts will utilize in evaluating the government's action.[4] Increased scrutiny raises the likelihood that a court will find the action unconstitutional. Generally speaking, there are three such levels of scrutiny: (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis review.

Strict scrutiny is the most demanding form of judicial review. The Supreme Court has observed that strict scrutiny applies to governmental classifications that are constitutionally "suspect," or that interfere with fundamental rights.[5] In determining whether a classification is suspect, courts consider whether the classified group (1) has historically been subject to discrimination; (2) is a

[11] Previously, the Fourth, Seventh, Ninth, and Tenth Circuits had struck down state same-sex marriage bans under equal protection or due process grounds after generally, though not uniformly, subjecting them to heightened levels of judicial scrutiny. Bostic v. Schaeffer, 760 F.3d 352 (4th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014). Conversely, the Sixth Circuit had upheld state same-sex marriage bans and observed that such bans warrant the lowest level of judicial review. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[2] U.S. Const. amend. XIV, §1.

[3] *See* Bolling v. Sharpe, 347 U.S. 497 (1954). More specifically, the Court has held that the Fifth Amendment's guarantee of "due process of the law," applicable to the federal government, incorporates equal protection guarantees. *See id.* at 500.

[4] *Compare* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (holding that mental disability is not a "quasi-suspect" classification, and thus is entitled to rational basis review), *with* Graham v. Richardson, 403 U.S. 365 (1971) (holding that classifications based on alienage are "inherently suspect," and are subject to strict scrutiny).

[5] *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); *see also* Heller v. Doe, 509 U.S. 312, 319 (1993).

minority group exhibiting an unchangeable characteristic that establishes the group as distinct; or (3) is inadequately protected by the political process.[6] There are generally three governmental classifications that are suspect—those based on race, national origin, and alienage.[7] When applying strict scrutiny to governmental action, reviewing courts consider whether the governmental action is *narrowly tailored* to a *compelling* government interest.[8] The government bears the burden of proving the constitutional validity of its action under strict scrutiny, and, in doing so, must generally show that it cannot meet its goals via less discriminatory means.[9]

Intermediate scrutiny is less searching than strict scrutiny, though it subjects governmental action to more stringent inspection than rational basis review. Intermediate scrutiny applies to "quasi-suspect" classifications such as classifications based on gender[10] or illegitimacy.[11] When reviewing courts apply intermediate scrutiny to governmental action, they determine whether the action is *substantially related* to achieving an *important* government interest.[12] As with strict scrutiny, the government bears the burden of establishing the constitutional validity of its actions under intermediate scrutiny.[13]

Rational basis review is the least searching form of judicial scrutiny, and generally applies to all classifications that are not subject to heightened levels of scrutiny.[14] For governmental action to survive rational basis review, it must be *rationally* related to a *legitimate* government interest.[15] When evaluating governmental action under rational basis review, courts consider the legitimacy of any possible governmental purpose behind the action.[16] That is, courts are not limited to considering the actual purposes behind the government's action.[17] Additionally, the governmental action needs only be a reasonable way of achieving a legitimate government purpose to survive rational basis review; it does not need to be the most reasonable way of doing so, or even more reasonable than alternatives.[18] Accordingly, rational basis review is deferential to the government, and courts generally presume that governmental action that is subject to such review is

[6] *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938).

[7] Graham, 403 U.S. at 371-72 ("… the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.").

[8] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

[9] *See* Fisher v. University of Tex. at Austin, 133 S. Ct. 2411, 2420 (2014).

[10] United States v. Virginia, 518 U.S. 515, 533 (1996); *see* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[11] Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.").

[12] *See* Craig v. Boren, 429 U.S. 190, 198 (1976); *see also Clark*, 486 U.S. at 461.

[13] *Virginia*, 518 U.S. at 533; *see Miss. Univ. for Women*, 458 U.S. at 724.

[14] *See Cleburne Living Center*, 473 U.S at 440-42; *see also* Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

[15] *See City of Cleburne*, 473 U.S. at 440.

[16] *See* Nordlinger v. Hahn, 505 U.S. 1, 15 (1992); *see also Heller*, 509 U.S. at 320.

[17] *See Nordlinger*, 505 U.S. at 15; *see also Heller*, 509 U.S. at 320.

[18] *See Schweiker*, 450 U.S. 221, 235 (1981) (observing that, under rational basis review, "[a]s long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred."); *see also Heller*, 509 U.S. at 320 (observing that under rational basis review, "a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'") (quoting F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 312 (1993)).

constitutionally valid.[19] Parties challenging governmental actions bear the burden of establishing their invalidity under rational basis review.[20]

Substantive Due Process

The U.S. Constitution's due process guarantees are contained within two separate clauses; one can be found in the Fifth Amendment, and the other resides in the Fourteenth Amendment. Each clause provides that the government shall not deprive a person of "life, liberty, or property, without due process of law."[21] However, the Fifth Amendment applies to action by the federal government, whereas the Fourteenth Amendment applies to state action.[22]

The Constitution's due process language makes clear that the government cannot deprive individuals of life, liberty, or property without observing certain procedural requirements. The Supreme Court has interpreted this language to also include substantive guarantees that prohibit the government from taking action that unduly burdens certain liberty interests.[23] More specifically, substantive due process protects against undue governmental infringement upon fundamental rights.[24] In determining whether a right is fundamental, Supreme Court precedent looks to whether the right was historically and traditionally recognized, and whether failing to recognize the right would contravene liberty and justice.[25]

The Supreme Court has held that governmental action infringing upon fundamental rights is subject to strict scrutiny,[26] and thus must be *narrowly tailored* to a *compelling* government interest.[27] Under strict scrutiny, the government must generally show that it has a "substantial" and "legitimate" need for its action to be in furtherance of a compelling government interest.[28] If the government successfully establishes a compelling interest, its action cannot encumber fundamental rights any more than is necessary to achieve the government's need.[29] Additionally, the government could not have possibly taken alternative action that would similarly further its interest while being less burdensome on fundamental rights.[30] Otherwise, the government's action is not narrowly tailored to the government's interest.[31] The Supreme Court has recognized a

[19] *See Beach Commc'ns, Inc.*, 508 U.S. at 315; *see also Murgia*, 427 U.S. at 315.

[20] *Heller*, 509 U.S. at 320 (noting that, when reviewing a governmental classification under rational basis review, a governmental action is "presumed constitutional," and the burden lies on the party attacking the governmental action to establish the action's unconstitutionality.).

[21] U.S. Const. amend. XIV, §1; U.S. Const. amend. V.

[22] *See* U.S. Const. amend. XIV, §1; U.S. Const. amend. V.

[23] *See* Washington v. Glucksberg, 521 U.S. 702, 719-720 (1997).

[24] *See id*.

[25] *See id*. at 720.

[26] *See* Reno v. Flores, 507 U.S. 292, 301-02 (1993).

[27] *Id.* (observing that a line of Supreme Court cases interprets the Fifth Amendment's and Fourteenth Amendment's due process principles to "forbid[] the government to infringe certain 'fundamental' liberty interests *at all* … unless the infringement is narrowly tailored to serve a compelling state interest.").

[28] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973).

[29] *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

[30] *Id.* ("if there are other, reasonable ways to achieve [government interests] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'") (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[31] *See id*.

number of rights as fundamental, including the right to have children,[32] use contraception,[33] and marry.[34]

In *Obergefell*, the Court considered whether the Fourteenth Amendment's substantive due process guarantees require states to issue marriage licenses to same-sex couples and require states to recognize same-sex marriages that were legally formed in other states.

The Supreme Court Invalidates State Same-Sex Marriage Bans in *Obergefell*

The Supreme Court resolved a circuit split on the constitutionality of state same-sex marriage bans, finding them unconstitutional in *Obergefell v. Hodges*. In doing so, the Court relied on the Constitution's due process and equal protection principles to hold that states must issue marriage licenses to same-sex couples and recognize same-sex marriages that were legally formed in other states.

The majority in *Obergefell* rested its decision upon the fundamental right to marry. The Court observed that it has long found the right to marry to be constitutionally protected, though it acknowledged that its precedent describing the right presumed an opposite-sex relationship.[35] Even so, according to the Court, these cases have identified reasons why the right to marry is fundamental,[36] which apply equally to same-sex couples.[37] These reasons included (1) personal choice in whom to marry is inherent in the concept of individual autonomy; (2) marriage's unique support and recognition of a two-person, committed union; (3) the safeguarding of children within a marriage, as both same-sex couples and opposite-sex couples have children; and (4) marriage as a keystone of the nation's social order, with no distinction between same-sex couples and opposite-sex couples in states conferring benefits and responsibilities upon marriages.[38] Accordingly, the Court extended the fundamental right to marry to same-sex couples.

In holding that the fundamental right to marry includes same-sex couples' right to marry, the Court appeared to acknowledge its departure from precedent for determining whether a right is fundamental—mentioned earlier in this report—which considers whether it is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty."[39] The Court observed that if rights were defined by who could historically use them, old practices could continuously prevent new groups from exercising fundamental rights.[40] As such, the Court found that "rights come not from ancient sources alone. They rise, too, from a better informed

[32] Skinner v. Okla., 316 U.S. 535 (1942).

[33] Griswold v. Connecticut, 381 U.S. 479 (1965).

[34] Loving v. Virginia, 388 U.S. 1 (1967).

[35] *Obergefell*, 135 S.Ct. at 2598.

[36] *Id*.

[37] *Id*. at 2599.

[38] *Id*. at 2599-2601.

[39] *Glucksberg*, 512 U.S. at 720.

[40] *Obergefell*, 135 S. Ct. at 2602 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").

understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[41]

After determining that the fundamental right to marry includes the right of same-sex couples to marry, the Court also seemed to depart from precedent—and the approaches of courts of appeals that relied on the fundamental right to marry to strike down state same-sex marriage bans—by not applying strict scrutiny to such bans. As previously noted, courts generally subject governmental action that infringes upon a fundamental right to strict scrutiny, requiring that the action be narrowly tailored to a compelling government interest to be constitutional.[42] The states had argued two primary interests for their bans on same-marriage: (1) the desire to wait and see how the same-sex marriage debate progresses before changing long-existing marriage norms; and (2) incentivizing procreating couples to stay together during child rearing. However, the Court made no mention of whether the state same-sex marriage bans at issue were narrowly tailored to these justifications. Rather, the Court noted why these justifications were invalid without appearing to apply any of the typical levels of judicial review (i.e., rational basis review, intermediate scrutiny, or strict scrutiny).[43]

The Court held that both equal protection and due process guarantees protect the fundamental right to marry, and that states can no longer deny this right to same-sex couples.[44] Importantly, in doing so, the Court did not hold that classifications based on sexual orientation warrant any form of heightened scrutiny. In fact, the Court made no mention of the proper level of scrutiny applicable to such classifications.

Some of the dissenting Justices in *Obergefell* thought that the majority exceeded the Court's proper role by removing the question of whether same-sex couples have the right to marry from the democratic process, where, they stated, it is properly resolved.[45] According to these Justices, the five-person majority should not have resolved the hotly contested issue of same-sex marriage for the entire country; such resolution should have come from the people.[46] The dissenting Justices also voiced concern with the majority looking beyond history and tradition to establish a fundamental right contrary to Supreme Court precedent.[47] According to the dissenting Justices, the requirement that fundamental rights be rooted in tradition and history exists to prevent the Court from imparting its policy decisions regarding which rights have constitutional protection.[48]

[41] *Id*.

[42] *See Flores*, 507 U.S. at 301-02.

[43] *See Obergefell,* 135 S. Ct. at 2605-07.

[44] *Id*. at 2604.

[45] *Id*. at 2612, 2615 (Roberts, J., dissenting).

[46] *See id*.

[47] *See id*. at 2617.

[48] *See id*.

Implications of the Supreme Court's Decision in *Obergefell*

Although the Supreme Court answered questions surrounding the constitutionality of state same-sex marriage bans in *Obergefell*, its decision raised a number of other questions. These include questions regarding, among other things, *Obergefell*'s broader impact on the rights of gay individuals; the proper level of judicial scrutiny applicable to classifications based on sexual orientation; what the decision might mean for laws prohibiting plural marriages; the Court's approach to recognizing fundamental rights moving forward; and the proper level of judicial scrutiny applicable to governmental action interfering with fundamental rights. This section briefly explores these questions.

Obergefell raised questions about the decision's broader impact on the rights of gay individuals—that is, whether its rationale extends rights to gay individuals outside of the marriage context. However, the decision appears limited to the marriage context. Although the majority opinion did make reference to same-sex marriage bans implicating equal protection guarantees, its holding rested entirely on such bans infringing upon the fundamental right to marry in violation of both equal protection and due process guarantees. The Court did not mention whether classifications based on sexual orientation are suspect or quasi-suspect, and thus warrant any form of heightened scrutiny. If the Court had rendered such a holding, its decision would have arguably had broader implications for the rights of gay individuals, as it would have potentially subjected all governmental action that classifies based on sexual orientation to a heightened form of judicial scrutiny.

Prior to *Obergefell*, federal appeals courts were split regarding the proper level of judicial scrutiny applicable to governmental action that classifies based on sexual orientation. The U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) has held that classifications based on sexual orientation warrant heightened scrutiny, though it did not clarify whether this heightened scrutiny was intermediate or strict scrutiny.[49] The U.S. Court of Appeals for the Second Circuit (Second Circuit) has similarly found that classifications based on sexual orientation are quasi-suspect, and thus any governmental action that classifies based on sexual orientation is subject to intermediate scrutiny.[50] Conversely, however, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) has held that governmental action that classifies based on sexual orientation is neither suspect nor quasi-suspect, and thus subject only to rational basis review.[51]

Because the Court's decision in *Obergefell* rested on the fundamental right to marry—and therefore seems limited to the marriage context—nothing in the opinion appears to resolve the circuit split between the Second, Sixth, and Ninth Circuits regarding the correct level of scrutiny applicable to classifications based on sexual orientation. Other lower courts will be left to grapple with this issue in the future. This ambiguity leaves open the possibility that, moving forward, circuit courts could either, like the Second and Ninth Circuits, apply heightened scrutiny to laws that classify based on sexual orientation (e.g., laws that provide exemptions from anti-discrimination legislation for religious entities based on their objections to certain sexual

[49] *See Latta*, 771 F.3d at 468.

[50] Windsor v. United States, 699 F.3d 169, 185 (2nd Cir. 2012).

[51] Davis v. Prison Health Servs., 679 F.3d 433, 438 (6th Cir. 2012).

orientations), or could apply rational basis review to such laws like the Sixth Circuit. The fact that some lower courts may apply heightened scrutiny to government action that classifies based on sexual orientation where other courts may not is significant because, as discussed earlier in this report, laws subject to higher levels of scrutiny are more likely to be found unconstitutional. As such, this could create a situation wherein similar laws that classify based on sexual orientation receive dissimilar outcomes when facing constitutional challenge, depending on the evaluating court.

The Supreme Court's decision in *Obergefell* also raised questions regarding whether the Court's rationale could potentially extend the fundamental right to marry to polygamy. In fact, Chief Justice John Roberts, in his dissent in *Obergefell*, seems to suggest that the majority's opinion could lead to the legalization of plural marriages.[52] However, the majority's opinion seems crafted so as to try to limit its reach to the same-sex marriage context, in a possible attempt to prevent its rationale from extending the fundamental right to marry to plural marriages.

As previously discussed, the majority in *Obergefell* found that the four reasons why the right to marry is fundamental apply equally to same-sex couples, and thus extended the fundamental right to marry to same-sex couples. Some commentators have observed that there are distinctions between plural marriages and same-sex marriages sufficient to prevent *Obergefell*'s rationale from being extended to legalize plural marriage.[53] Conversely, other commentators have observed that parts of the Court's opinion discussing why the fundamental right to marry includes same-sex marriage (e.g., the majority's consideration of individual autonomy and family) could potentially provide basis for extending constitutional protections to plural marriages.[54]

Additionally, the majority in *Obergefell* seemingly departed from precedent for determining whether a right is fundamental by looking beyond historical and traditional recognition. This deviation from prior cases raises the possibility that, when determining whether a right is fundamental in the future, the Court will consider how the right is viewed at the time, in addition to its historical and traditional recognition. This could have the effect of expanding the number of rights that are deemed fundamental for purposes of substantive due process protections.

Finally, the Court did not clarify which, if any, of the typical levels of judicial review (i.e., rational basis review, intermediate scrutiny, or strict scrutiny) it applied to state same-sex marriage bans after finding that such bans interfere with same-sex couples' fundamental right to marry. Moving forward, this raises questions regarding the proper level of judicial scrutiny

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[52] *See Obergefell*, 135 S. Ct. at 2621 ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage.").

[53] *See, e.g.*, Joanna L. Grossman and Lawrence M. Friedman, *Is Three Still a Crowd? Polygamy and the Law After Obergefell v. Hodges*, JUSTIA, July 7, 2015, https://verdict.justia.com/2015/07/07/is-three-still-a-crowd-polygamy-and-the-law-after-obergefell-v-hodges (observing that, to win in court, polygamists must "convince a court that the justification for allowing same-sex couples to marry applies with equal force to a person who wants multiple spouses," and questioning whether the four "main reasons for recognizing the right of same-sex couples to marry" apply to polygamists); *see also* Richard A. Posner, *The Chief Justice's Dissent is Heartless*, Slate, June 27, 2015, http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_gay_marriage_john_roberts_dissent_in_obergefell_is_heartless.html.

[54] *See, e.g.*, William Baude, *Is Polygamy Next?*, N. Y. TIMES, July 21, 2015, http://www.nytimes.com/2015/07/21/opinion/is-polygamy-next.html?mabReward=CTM&action=click&pgtype=Homepage&region=CColumn&module=Recommendation&src=rechp&WT.nav=RecEngine; *see also* Jonathan Turley, *The Trouble with the 'Dignity' of Same-Sex Marriage*, Wash. Post, July 2, 2015, https://www.washingtonpost.com/opinions/the-trouble-with-the-dignity-of-same-sex-marriage/2015/07/02/43bd8f70-1f4e-11e5-aeb9-a411a84c9d55_story.html.

applicable to governmental action that infringes upon fundamental rights. Given that increased scrutiny decreases the likelihood that a court will find government action constitutional, this could create ambiguity regarding the degree to which the government can permissibly take action that interferes with fundamental rights.

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